FOR ARGUMENT

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Nos. 76-419 and 76-528

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-419

VERMONT YANKEE NUCLEAR POWER CORPORATION,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

No. 76-528

CONSUMERS POWER COMPANY, *Petitioner,*

v.

NELSON AESCHLIMAN, SAGINAW VALLEY NUCLEAR STUDY GROUP, *et al.*, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONER CONSUMERS POWER COMPANY

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REPLY BRIEF FOR PETITIONER CONSUMERS POWER COMPANY

Although Consumers' principal brief adequately sets forth its reasons for believing that the decision below should be reversed, the Court may be aided by brief

responses to some of the more extreme assertions in the brief for the non-federal respondents.

I

THE ENERGY CONSERVATION ISSUE

The non-federal respondents continue to assert that the Commission simply refused to consider energy conservation—that, as they put it, "[T]he Commission's refusal to consider energy conservation issues was improper" (Br. p. 32). That the Commission did, and at length, consider such issues is detailed in our main brief (pp. 22-30), but further comment may be useful.

1. The Midland proceeding involved extensive consideration of the need for the power to be generated—in the environmental report prepared by Consumers and submitted to the Commission (R. 12,612; updated 15,697, 16,044, 16,293), in the Commission's Draft Environmental Statement (R. 16,152), and at the hearing before the Licensing Board, at which a number of the environmental contentions filed by Saginaw which it later characterized as "energy conservation" contentions were expressly dealt with (see Consumers' Br. pp. 23-24).

The complaint of the non-federal respondents is not, therefore, that the Commission "refused to consider energy conservation," but rather that it declined to consider "whether an appropriate alternative to satisfying the demand would be to set limits on particular uses of electricity" and "to inquire into whether the customary uses being made of electricity in our society are 'proper' or 'improper'" (Jt. App. p. 207). That decision was reviewed by the Appeal Board (Jt. App. pp. 305-307) and by the Commission itself in a long and

careful opinion (Jt. App. pp. 324-345), which considered each of the "energy conservation" contentions of the non-federal respondents.

2. Not only were "energy conservation" issues considered in the Midland proceeding, but also the Commission's disposition of them was entirely proper, and consistent with its position on such issues both before and after its Midland decision. Contrary to the contention of the non-federal respondents (Br. pp. 7-8) the Commission did not, before the Midland decision, assert that it had a duty or responsibility to limit demand by controlling growth. In 1971, in one of the statements cited (at p. 7) by the non-federal respondents, Dr. Schlesinger, then Chairman of the Commission, commenting on "whether our society for environmental reasons viewed broadly ought not to curb its appetite for energy and electric power," concluded:

> "Whatever the private views of the Commissioners, it would seem to me inappropriate for the Atomic Energy Commission to take a position on this issue. The AEC should be officially neutral. It is the AEC's mission to provide energy options that will serve public needs—in whatever manner the public prescribes those needs. The AEC lacks authority and consequently should avoid becoming entangled in the determination of broad social issues of this type."[1]

Nor, again contrary to the assertions of the non-federal respondents (Br. pp. 40-41), did the Commission abandon the position adopted in the Midland opinion, on either the scope of its authority and re-

[1] Speech of October 20, 1971, reprinted in, Selected Materials on the Calvert Cliffs Decision, Its Origin and Aftermath, Joint Comm. on Atomic Energy, 92d Cong., 1st Sess., p. 397.

sponsibility, or on the so-called "threshold test"—which, in essence, simply required that intervenors formulate their contentions with at least some specificity, and indicate more precisely how their suggestions might reduce the projected need for power.[2] *See, e.g., Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear-1), 7 A.E.C. 557, 615-620 (April 5, 1974); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Unit No. 2), 8 A.E.C. 277, 288 (Aug. 2, 1974). Even in the *Northern States Power Company* case (Prairie Island Nuclear Generating Plant, Units 1 and 2), 7 A.E.C. 487 (1974), cited on page 41 of the non-federal respondent's brief, the Licensing Board applied, in specific terms, the elements of the Midland decision, including those of the "threshold test" as it pertained to the intervenors' energy conservation contentions. *See* 7 A.E.C. 491-494.

3. It is also worth repeating that the non-federal respondents continue to ignore the fact (Br. pp. 36-39) that, notwithstanding the Commission's statement of position that it would not apply its decision in the *Niagara Mohawk* case retroactively, the statement was *obiter* only, at least insofar as Midland was concerned, since the Commission found that the decisions of the Licensing Board and the Appeal Board were fully consistent with the *Niagara Mohawk* decision. Its summary of its conclusions warrants quotation (Jt. App. p. 334):

[2] The requirement, as such, is nothing new, but stems from a long-standing provision of 10 C.F.R. §2.714(a)—specifically sanctioned by the court below—directing that contentions be stated with specificity and particularity. *See* BPI v. AEC, 502 F.2d 424, 426-429 (1974). In addition, where NEPA is involved, a rule of reason applies. Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 834 (D.C. Cir. 1972).

> "Summarizing the analysis [of the alleged "energy conservation" contentions] which follows, we find that Saginaw properly raised one related group of legitimate energy conservation issues which the Licensing Board allowed. Saginaw obliquely raised a second energy conservation issue essentially similar to the rate structure issue we allowed in *Niagara,* which the Board also allowed. The Board properly excluded several alleged energy conservation contentions concerning certain customer uses of electricity. Finally, several other contentions of Saginaw's allegedly precluded by the Board were in fact allowed, but they had nothing to do with energy conservation."

4. Finally, the non-federal respondents' brief refers (*e.g.,* pp. 18-21) to the recent Licensing Board hearings on the issue of whether the Commission should order that construction at Midland be suspended pending further consideration by the Commission of the issues remanded to it by the court below.[3] While those hearings are not part of the record now before the Court, some comment is warranted.

The non-federal respondents' brief offers one party's view of evidence presented during a lengthy, contested proceeding. Not surprisingly there has been and continues to be considerable dispute as to the proper conclusions to be drawn.[4] It is noteworthy, however, that the Licensing Board's order declining to suspend con-

[3] The Licensing Board, on September 23, 1977, declined to order construction suspended. Exceptions have been filed and the decision is now undergoing appellate review within the agency. *See* 2 *Nuclear Reg. Rep.* (CCH) ¶ 30,234.

[4] In fact, the non-federal respondents' brief discloses that there may be disagreement even as to what evidence was received. For example, page 19 contains the statement that Consumers recently lowered its projected demand for the year 1979 by 38.5%. This is not true. A recent "short term" sales forecast, prepared for budget-

struction found a need for both the electrical power and process steam which the Midland plant is intended to supply (*Consumers Power Company* (Midland Plant, Units 1 and 2), Order, p. 21 (slip opinion)).

More importantly, the mere reconsideration of demand information, as revised, updated, and presented during the recent suspension hearings, begs an important point. Although it has been noted before (Consumers' Br. p. 34), it bears repeating that NEPA is less demanding in cases such as the present one—where the proposal is privately planned, financed and executed—than when a federal project is involved. When a federal agency is initiating its own proposal "NEPA is 'intended to assure [environmental] consideration during the development of [the] proposal,' whereas when private action is to be approved, NEPA seeks only to assure such consideration '*during the formulation of a position on* [*the*] *proposal* submitted by private parties.' " *Kleppe* v. *Sierra Club,* 427 U.S. 390, 419 n. 1 (Marshall, J., concurring and dissenting) (emphasis added). In the case of a private undertaking, once a good faith, reasonable effort to consider environmental impacts has been made by the federal agency whose approval is being sought, no more is required. NEPA does not mandate, in the face of increasing commitments of private capital and other resources, a continuous, realtime updating of impacts and the cost-benefit analysis.

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ing purposes and not received in evidence by the Licensing Board conducting the suspension proceedings, did reflect a 38.5% reduction in the *rate* of load growth for that year, but estimated load for 1979 is now only 2.4% lower than that reflected in the prior comparable estimate. In addition, there has been no revision of demand projections contained in Consumers' "long term" planning forecasts for 1981 and 1982, when the Midland units are expected to commence operation.

II

THE ACRS REPORT

The ACRS issue in this case stems from the statutory requirement contained in Section 182b. of the Atomic Energy Act of 1954 that, "The Advisory Committee on Reactor Safeguards shall review each application . . . for a construction permit . . . and shall submit a report thereon which shall be made part of the record of the application and available to the public . . ." (42 U.S.C. § 2232(b)). There is no dispute that the literal requirements of the statute were met. The disagreement arises over whether, as the court of appals decided, the ACRS report should have been returned *sua sponte* by the Licensing Board for specification of the "other problems" in language "understandable to a layman" (Jt. App. p. 108). As both Consumers Power and the Federal Respondents have already explained, however, the law did not require such action and to have done so would have been at odds with its purpose (*see* Consumers Br. pp. 35-38; Federal Respondent's Br. pp. 66-73). Nothing which has been presented subsequently provides a basis for changing those conclusions.

It is important to note that, not only is the language of the statute clear as to the duties and role of the Advisory Committee on Reactor Safeguards, but Congress has kept itself actively informed of the conduct of ACRS business. The ACRS has, for a long time, reported to Congress concerning its activities (*e.g., Radiation Safety and Regulation Hearings Before the Joint Comm. on Atomic Energy,* 87th Cong., 1st Sess. (1961) pp. 21-29; *Licensing and Regulation of Nuclear Reactors Hearings Before the Joint Comm. on Atomic*

Energy, 90th Congress, 1st Sess. (1967), pp. 84-130). In particular, the ACRS has described to the Joint Committee on Atomic Energy the use of its "[o]ther problems" phraseology in reports (*Nuclear Reactor Safety Hearings Before the Joint Committee on Atomic Energy,* 93rd Cong., 1st Sess. (1973), pt.1, pp. 384, 405, 417). Given the responsibility and place of the Joint Committee in the statutory scheme at the time,[5] it is not unfair to read this history as a *de facto* acquiscence in and ratification of the ACRS' review procedure (*see Power Reactor Co.* v. *Electricians,* 367 U.S. 405, 409).

As for the confusion mentioned in connection with the NRC's Midland suspension hearings, contrary to the non-federal respondents' allegation (Br. p. 21), the Staff did not express the view that it was "in the dark as to what the ACRS' 'other problems' are." Rather, it expressed natural uncertainty concerning the details of the future resolution and, therefore, whether solutions would ultimately result in additional overall costs or savings. *See, e.g.,* Tr. 4260-4260-4261. This Court has observed that:

> "[N]uclear reactors are fast-developing and fast-changing. What is up to date now may not, probably will not, be as acceptable tomorrow. Problems which seem insuperable now may be solved tomorrow, perhaps in the very process of construction itself."

Power Reactor Co. v. *Electricians,* 367 U.S. 405, 408.

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[5] The Joint Committee was dissolved earlier this year and its functions have been assumed by others. *See* Act of Sept. 20, 1977, Pub. L. No. 95-110, 91 Stat. 884.

In any event, the Atomic Energy Act of 1954 provides a framework whereby reactors are licensed in a two-step, construction permit/operating license process. Within this framework the Commission can defer a definitive safety finding until it considers the application for an operating license, at which time the ACRS will again make a public report. *See id.* at 407-415. Nor does NEPA prohibit the authorization of construction because of the existence of some cost uncertainties. That Act was not intended to repeal by implication any statute, *United States* v. *SCRAP,* 412 U.S. 669, 694. To the extent there is a conflict of statutory duty, NEPA's impact statement requirement is inapplicable. *See Flint Ridge Development Co.* v. *Scenic Rivers Ass'n of Okl.,* —— U.S. ——, 96 S. Ct. 2430.

Finally, a review of the *Hartsville* case, cited at page 49 of the non-federal respondents' brief, reveals that while the Licensing Board may have desired more detail, the ACRS report did not prevent it from reaching a fully considered decision, based on the record.

III

THE "DOW" ISSUE

As noted earlier in Consumers' principal brief (p. 46), if this Court finds the Commission's actions otherwise valid, it need not be concerned with the "Dow" issue. A review of the non-federal respondents' brief suggests, however, that some clarification of the matter may be helpful.

The Midland plant is designed and situated so as to be able to provide process steam and electricity to the large Dow Chemical Company complex located nearby.

There is presently in effect a General Agreement between Consumers and Dow, to which have been added a Contract for Supply of Water (R. 25,705); an Agreement for Electric Service, or "Electric Contract" (R. 25,718); and a Contract for Steam Service, or "Steam Contract" (R. 25,731).

The current versions of the Steam and Electric Contracts were executed in January 1974, while this case was pending before the court below. Shortly thereafter, intervenors before the NRC moved that the Commission reopen the proceedings because of alleged significant changes in Dow's commitment to take process steam and electric power from the Midland plant. The matter was investigated by the Commission, and three memoranda and orders were issued (Joint App. pp. 346-351). The Commission concluded (Joint App. p. 351):

> "We have carefully reviewed the relevant portions of these contracts and reaffirm our prior determination that there are no 'changed circumstances' as alleged by Saginaw, warranting a reopening of these proceedings. We think it is sufficient to note that Dow has a contractural [sic] commitment to purchase large quantities of process steam from the completed facility, that substantial purchases of electricity are also contemplated, and that Dow's existing fossil-fueled facilities are to be maintained primarily on a stand-by basis."

Nevertheless, in remanding the case to the Commission the court below stated that it assumed "the Commission will take into account the changed circumstances regarding Dow's need for process steam, and the intended continued operation of Dow's fossil-fuel generating facilities." (Joint App. p. 109.)

The essence of the issue is that today—just as when the Commission investigated the matter in 1974, discussed *supra*,—"Dow has a contractual commitment to purchase large quantities of process steam from the completed facility, . . . substantial purchases of electricity are contemplated, and Dow's existing fossil-fueled facilities are to be maintained primarily on a stand-by basis." Although there was no minimum requirement for steam in the initial steam proposal, Dow is currently obligated to take at least 2,000,000 pounds per hour of 175 psig steam. There is no minimum requirement for 600 psig steam (*see* R. 35,684, 35,731), but based on formal notification procedures under Section 12 of the Steam Contract, Dow has indicated its desire to reserve capacities of up to 2,400,000 pounds per hour of 175 psig steam and 400,000 pounds per hour of 600 psig steam for a later date (*see Consumers Power Company* (Midland Plant, Units 1 and 2), Order of September 23, 1977, p. 12 (slip opinion)). Although Dow is no longer required to close down its fossil-fueled facilities, the company now produces its own steam, for both process and electrical generation purposes, "in antiquated facilities that will not likely be operable through 1984; which do not now meet Michigan air quality standards; and which are being operated under a waiver from the Michigan Air Pollution Control Commission (*id.* at p. 11-12) (citation omitted).

As far as electricity requirements are concerned, the initial electric proposal provided for Consumers to supply all of Dow's electrical needs, up to 400 MW, while the present electric contract provides for Consumers to supply electric energy as auxiliary or standby to Dow's existing generating facilities, with a con-

tract demand established at 300 MW. (R. 25,718). However, in view of the limited remaining useful life of the fossil-fueled units, this provision of the current contract is of no practical significance, and the need for 175 to 200 MW of electricity has been established (*Consumers Power Company* (Midland Plant, Units 1 and 2), Order of September 23, 1977, p. 21 (slip opinion)).

In sum, there have been modifications of contracts first executed in 1967—and there will likely be others—to reflect changing circumstances; nevertheless, there has been no material change in Dow's commitments. The contracts executed in 1974 and reviewed by the Commission remain unchanged.[6] Dow is committed by contract to purchase substantial quantities of process steam and is fully expected to obtain elec-

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[6] According to the non-federal respondents' brief, "Consumers told the Commission, in its June 13, 1977 Brief on the suspension issue, that the Commission is powerless to look beyond the bare fact that contracts between Dow and Consumers exist" (Br. p. 23 n. 10). While the allegation is less than clear, to the extent it states or suggests that Consumers took the position that the Commission lacked authority to look into and examine contract terms and the intent of the parties, it is—as the brief referenced in the statement itself reveals—untrue.

In addition, non-federal respondents have, in their brief, misrepresented the September 23, 1977 Licensing Board order by stating that it contains a "finding that Consumers had attempted to conceal vital information" and of the existence of an "attempt of Consumers and its counsel to suppress information concerning the Dow dispute" (Br. pp. 20 n. 8, 24). At Consumers' request, the Licensing Board clarified that part of the September 23, 1977 order that served as the basis of these misstatements, and by order dated November 4, 1977, has stated that (p. 2):

> "No such findings were made nor intended. Nor have we concluded that there was any misconduct on the part of attorneys in this proceeding in the questioned paragraphs."

tricity from Consumers. Further, while Dow is no longer required by contract to close down its fossil-fueled facilities[7] it has no plans other than to cease operating them when supplys of process steam and electricity become available from Midland.[8]

IV

THE FUEL CYCLE ISSUE

This matter is dealt with in detail in the brief of *Vermont Yankee,* and Consumers adopts the position taken therein with respect to this issue.

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[7] On pages 15 and 16 of their brief, the non-federal respondents refer to "the closing of *Dow's fossil-fuel facilities,*" "the closing of *Dow's plant,*" and "the closing of *Dow's fossil-fuel plant*" (emphasis added). In context, it is clear that these phrases are equivalent, especially since the closing down of the Dow complex at Midland—which might be taken to be the meaning of "Dow's plant"—is not contemplated by anyone and no way in issue here.

[8] In any event, the Commission found that, while the closing of Dow's fossil-fuel facilities was a factor, it was not determinative in the NEPA cost-benefit analysis. Joint App. p. 349. For example, it was not made a condition of the construction permits (R. 23,083, 23,086) nor was it mentioned in the summary of adverse and beneficial effects in the FES (R. 17,355, 17,356-357).

CONCLUSION

Wherefore, Consumers believes that the argument and conclusions of its principal brief remain valid, and respectfully renews its plea that the decision of the court below be reversed, and that the petitions to review the order of the Commission granting construction permits to Consumers for the Midland plant be dismissed.

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